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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1924.

No. 222.

JOHN ALDEN LEE, INDIVIDUALLY AND AS TRUSTEE OF LEWIS C. PAINE,

Appellant,

against

LEHIGH VALLEY COAL COMPANY, IMPLEADED WITH KATE P. DIXON,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE LEHIGH VALLEY COAL COMPANY.

ALLAN McCULLOH,
CHARLES W. PIERSON,
CAMPBELL LOCKE,
Of Counsel for Appellee.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1924.

No. 222.

JOHN ALDEN LEE, individually and as Trustee of Lewis C. Paine,
Appellant,

AGAINST

LEHIGH VALLEY COAL COMPANY, impleaded with KATE P. DIXON,
Appellee.

BRIEF FOR APPELLEE LEHIGH VALLEY COAL COMPANY.

This is an appeal (p. 1) under Section 238 of the Judicial Code from the District Court of the United States for the Southern District of New York and brings up for review a determination by that Court (pp. 2, 3) that the Court was without jurisdiction for the reason that the defendant Kate P. Dixon, a citizen of Pennsylvania, was a necessary and indispensable party and should be aligned as party complainant, and, upon such alignment, the requisite diversity of citizenship did not exist as the defendant Lehigh Valley Coal Company, the appellee herein, was also a citizen of Pennsylvania.

POINT I.

The defendant Kate P. Dixon should properly be aligned as a party complainant.

All parties necessary to the adjudication of the rights of the parties on the one side or the other, having the same rights and interests, must be citizens of different states from those on the other side, no matter whether they are, on the face of the pleading, stated as plaintiffs, or complainants, or defendants. The court will, in determining the question of jurisdiction, place the parties on the one side or the other, according to their respective interest in the subject-matter of litigation.

Removal Cases, 100 U. S. 457, 469.

The bill of complaint alleges that the complainant John Alden Lee is trustee for himself and his brother Lewis C. Paine (p. 14) of an undivided one-half of certain premises situated in Luzerne County, Pennsylvania, described in a coal mining lease made by the predecessors in interest of the complainant and the defendant Kate P. Dixon to the defendant appellee Lehigh Valley Coal Company, and of the rental thereunder (pp. 10-12), and that the defendant Kate P. Dixon is vested in fee with the other undivided one-half interest in said premises and with an equal undivided one-half interest as a tenant in common with the complainant in the rental under said lease (p. 11); that during 1905 and until January 31, 1913, the defendant appellee Lehigh Valley Coal Company neglected and refused to pay the rent or royalty reserved

under said lease (p. 12); that, pursuant to an agreement dated January 21, 1913, executed by the attorney in fact for the complainant John Alden Lee, the said Lewis C. Paine and others interested in the said undivided one-half interest under said lease and the defendant appellee Lehigh Valley Coal Company, the latter paid to said attorney in fact a sum equal to fifty per cent. of the minimum rental due since March, 1905, with interest in full of their share of the minimum rental up to the date of said agreement (p. 13); and after alleging certain acts claimed to constitute breaches of said agreement (pp. 15, 16), demands judgment, among other things (p. 16):

(1) that the true meaning and effect of said lease may be judicially determined in accordance with the law of Pennsylvania;

(2) that the true force and effect of said agreement of January 21, 1913, may be judicially determined;

(3) that it be judicially determined that a certain portion of said agrement of January 21, 1913, is wholly without consideration, a fraud upon the complainant and the defendant Kate P. Dixon, and illegal, unlawful, and void;

(4) that the defendant appellee, Lehigh Valley Coal Company, be compelled to account to the complainant and to the defendant Kate P. Dixon, pursuant to the terms and requirements of said lease, for each and every ton of coal mined and sold by it since January 21, 1913, or, in the alternative, for the minimum royalties since said date, and to pay over to the complainant one-half of the amount found due; and

(5) that said lease be declared to be in full force and effect as to all its terms and provisions, and to have been in full and continuous force since January 21, 1913.

The bill of complaint (p. 9) alleges that the complainant is a citizen of the United States and a citizen of and resides in the State of New York; that the defendant appellee Lehigh Valley Coal Company is a citizen of the United States and of the State of Pennsylvania but has complied with Sections 15 and 16 of the General Corporation Law of the State of New York, and has obtained from the Secretary of State of that State a certificate entitling it to do business therein and has and has had a place of business and is and has been conducting business therein; and

> "That the defendant, Kate P. Dixon is a citizen of the United States and of the State of Pennsylvania and resides at 75 North River Street, City of Wilkes-Barre, in the State of Pennsylvania, and is a proper party plaintiff to this action but has been made a party defendant because of her expressed unwillingness and refusal to be made a party plaintiff, and because to make her such party plaintiff would oust the Court of jurisdiction" (p. 9); and

> "That before the commencement of this action plaintiff demanded of the defendant Kate P. Dixon, that she become a party plaintiff to this action and that she declined and refused so to do and she is, in consequence, made a party defendant hereto" (p. 16);

and that

> "The grounds upon which the Court's jurisdiction depends is that the amount involved in this cause is over $3,000. exclusive of interest

> and costs and there is diversity of citizenship between plaintiff and all the defendants" (p. 10).

After service on October 5, 1923 (p. 5), of the subpœna and bill of complaint on its Secretary in the City of New York, the defendant appellee Lehigh Valley Coal Company, appearing specially for that purpose, made an application (pp. 3-6) for the setting aside of the service and the dismissal of the bill of complaint on the ground that it appeared from the bill of complaint that the District Court was without jurisdiction. By an order of the District Court entered October 25, 1923 (pp. 2-3), it was adjudged that upon a proper alignment of the defendant Kate P. Dixon as a party complainant the requisite diversity of citizenship did not exist in the suit to confer jurisdiction on the Court upon that ground, and the application to dismiss the bill of complaint was granted, and the complainant takes the present appeal (p. 1).

The allegations of the bill of complaint thus disclose and the complainant admits (p. 9) that upon a proper arrangement of the parties the defendant Kate P. Dixon should be aligned on the side of the complainant. No controversy is alleged between her and the complainant.

POINT II.

The defendant Kate P. Dixon is an indispensable party.

The nature of the suit as disclosed upon the face of the bill of complaint and the prayer for judgment show clearly that the interest of the defendant Kate P. Dixon is such that a final decree cannot be made without her presence as a party without the possibility of injuriously affecting her rights or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. In her absence the true meaning and effect of the lease cannot be determined (p. 16) nor can it be declared to be in full force and effect or to have been in full and continuous force since January 21, 1913 (p. 17), so as to be binding on her, and its construction, if determined in a suit in which she was not joined, might be differently determined in another suit initiated by her or to which she was a party. The defendant appellee Lehigh Valley Coal Company should not be subjected to the possible hazard of contradictory determinations in separate litigations. Without Kate P. Dixon as a party it cannot be effectually judicially determined that a portion of the agreement of January 21, 1913, was a fraud upon her as demanded (p. 16), nor can the defendant appellee Lehigh Valley Coal Company be compelled to account to her (p. 16) unless she be joined in the suit.

POINT III.

The defendant Kate P. Dixon being an indispensable party and properly alignable as a complainant and being a citizen of the same State as the defendant appellee Lehigh Valley Coal Company, the District Court had no jurisdiction as the requisite diversity of citizenship did not exist.

The appellant invokes the provisions of Section 50 of the Judicial Code which permits the Court to proceed in certain cases without the presence of absent parties. It is well settled that this rule does not affect the principle that a suit cannot be entertained in the absence of an indispensable party.

Barney v. *Baltimore,* 6 Wall. 280.

It may well be that in a case originally brought in the District Court, as distinguished from a case removed thereto, the presence of a party, even although not indispensable, will defeat the jurisdiction if his presence destroys the requisite diversity of citizenship. The complainant has selected his forum and named the parties to the suit and he must abide the effect of his voluntary acts. The case of *Salem Trust Company* v. *Manufacturers' Finance Company, et al.,* 264 U. S. 182, cited by the appellant, was a removed case and not one originally instituted in the District Court.

The allegations that Kate P. Dixon was made a party defendant because of her expressed unwilling-

ness and refusal to be made a party complainant though so requested, and that to make her a complainant would oust the Court of jurisdiction (pp. 9, 16), cannot avail the complainant.

> "When it is obvious that a party who is really on complainant's side has been made a defendant for jurisdictional reasons, and for the purpose of reopening in the United States courts a controversy already decided in the state courts, the court will look beyond the pleadings and arrange the parties according to their actual sides in the dispute." (Quoted from head note.)
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> *Dawson* v. *Columbia Trust Company*, 197 U. S. 178.

POINT IV.

The question of jurisdiction was determined adversely to the complainant in a preceding suit.

Prior to the present suit the appellant attempted to institute a like suit in the same District Court, upon a bill of complaint substantially similar (pp. 47, 48), naming the same parties as defendants, and, on application of the defendant appellee Lehigh Valley Coal Company, the bill of complaint was dismissed therein on the ground that it appeared on the face thereof that the Court did not have jurisdiction (p. 6). The Court in its opinion (fol. 51) rendered in the prior suit referred to a previous decision in that District in which, in a suit for an accounting upon a written contract brought by citizens of Texas and Illinois against the other parties to the contract

who were citizens of New York, it was held that another citizen of New York, who had been joined as defendant but who was a party to the same side of the contract as the complainants, should be aligned as complainant, and that jurisdiction was thereby defeated.

Menefee v. *Frost,* 123 Fed. 633.

POINT V.

The action of the District Court in dismissing the bill of complaint should be affirmed.

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